SUPREME COURT DECISIONS ON THE COMMERCE CLAUSE AND STATE TAXING POWER, 1910-1914

Chief Justice Marshall in 1827 established that the taxing power of the states is limited by the grant to Congress of power over interstate and foreign commerce. There has been no doubt since then that any state tax which in the opinion of the court amounts to a regulation of interstate commerce is void. No such concord, however, prevails as to the tests to be applied for determining whether a tax is a regulation of commerce "in the constitutional sense." Judges who render lip-service to the same test or tests often part company in applying them. Chief Justice Marshall anticipated such difficulties when with reference to an express limitation on state taxing power he said:

> "The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application." [1]

The difficulties have been even greater in dealing with limitations that arise only by implication. Such general rules as apparently have been evolved cannot stand the strain of economic analysis, and their generality is open to suspicion even when looked at with the blurred vision of legalistic conceptualism. Certainly it is not true, as often professed, that the states cannot tax interstate commerce. It taxes credulity even to believe that they cannot tax interstate commerce "as such." In this state of affairs, "there is wisdom . . . in the ascertaining of the intent and application of . . . the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." [2]

The present recital covers the inclusion and exclusion indulged in by the Supreme Court on the topic of state taxation of interstate commerce during the four terms of court from October, 1910, to June, 1914. This paper is a companion to two earlier ones covering the decisions on the

[1] In *Brown* v. *Maryland* (U. S. 1827) 12 Wheat. 419, 441.
[2] Mr. Justice Miller, in *Davidson* v. *New Orleans* (1877) 96 U. S. 97, 104.

commerce clause and state police power during the same period.[3] The restraint there practiced is observed here. The method is that of the camera rather than the brush. For the work of artists the spectator is referred to the law review discussions pointed out in the footnotes. A number of the decisions here reviewed involve also some question of the effect of the commerce clause on the exercise of state police power. These are indicated by including in the citation of the decision a reference to the place in this journal in which the police power question has been presented.

State inspection laws brought to the Supreme Court four cases in which it was contended that the fees were so excessive as to amount to an invalid tax on interstate commerce and not merely reimbursement for the expense entailed; but in only one was the objection found to be supported by the facts. This was *Foote* v. *Stanley*[4] in which Maryland's fees for the inspection of oysters sold or packed within the state had yielded about $40,000 a year, of which only one-third went to pay the salaries of the inspectors engaged in the particular work for which the fee was ostensibly levied. Under the statute the excess went to pay other expenses of the State Fishery Force whose duties were found by the court to be more concerned with other matters than with inspection. More than half of the complainants' oysters were of Maryland origin, but the whole charge on them was held invalid "because there is no claim that the intrastate commerce can be separated from the interstate shipments, or that the legislature would have taxed one and left the other untaxed." Mr. Justice Lamar put the applicable principles as follows:

"The Constitution prohibits a State from regulating interstate commerce, but at the same time authorizes the collection of the necessary expenses of its inspection laws with the result that interstate commerce is to that extent lawfully burdened. . . .

"Inspection necessarily involves expense and the power to fix the fee, to cover that expense, is left primarily to the legislature which must exercise discretion in determining the amount to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Beside, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fees exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the Legislature will reduce the fees to a proper sum. . . . But when the facts show that what was known to be an unnecessary amount has been levied, or that what has proved

[3] (1921) 21 Columbia Law Rev. 737; and (1922) 22 Columbia Law Rev. 28.
[4] (1914) 232 U. S. 494, 34 Sup. Ct. 377; (1921) 21 Columbia Law Rev. 756. See (1914) 14 Columbia Law Rev. 532.

to be an unreasonable charge is continued, then, they are obliged to act in the light of those facts and to give effect to the provision of the Constitution prohibiting the collection by a State of more than is necessary for executing its inspection laws. In such inquiry they treat the fees fixed by the Legislature for inspection proper as *prima facie* reasonable and do not enter into any nice calculation as to the difference between cost and collection; nor will they declare the fees to be excessive unless it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the inspection services rendered. Still, effect must be given to the provision of the Constitution, which, in unusual and emphatic terms, permits the State to collect only what is 'absolutely necessary'. If, therefore, it is shown, that the fees are disproportionate to the service rendered; or, that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void because such costs, by necessary operation obstruct the freedom of commerce among the States." [5]

Earlier in the opinion inspection was distinguished from policing though it was recognized that the two functions may sometimes overlap. The expenses of policing proper were held not legitimately part of the cost of inspection, which is usually "accomplished by looking at or weighing or measuring the thing to be inspected."

In three other cases the charge that the fees were so excessive as to make the law in effect an exercise of fiscal power was held not to be substantiated by proof. In *Red "C" Oil Co.* v. *Board of Agriculture* [6] the bill to enjoin the operation of the act was filed when the statute had been in force but two days "when, of necessity, the result of its operations was conjectural." The charge was one-half cent per gallon of oil, and a number of states charged more than that. The court declined to consider the operation of the law subsequent to the filing of the bill, justifying this refusal not only on technical grounds but because of the presumption that the state would reduce its fees if experience proved them excessive. The fact that the statute referred to the charge as a tax was held not controlling, since the demands were part of an inspection law and therefore to be judged by their results. In *Savage* v. *Jones* [7] the fees for inspecting feeding stuffs were 80 cents per 100 pounds, with corresponding amounts for 50 and 25 pounds. An advance payment for stamps to the value of $5 was required, but the complainant was declared not to be prejudiced thereby in view of the volume of his business. No proof was given as to the fiscal results of the imposition as compared with the cost of inspection. *Standard Stock Food Co.* v. *Wright* [8] was similar, with the added element that vendors

[5] *Foote* v. *Stanley*, *supra*, footnote 4, pp. 503-4.

[6] (1912) 222 U. S. 380, 32 Sup. Ct. 152; (1912) 21 Columbia Law Rev. 756. The decision in the state court is commented on in (1910) 10 Columbia Law Rev. 72.

[7] (1912) 225 U. S. 501, 32 Sup. Ct. 715; (1921) 21 Columbia Law Rev. 756; (1922) 22 Columbia Law Rev. 44.

[8] (1912) 225 U. S. 540, 32 Sup. Ct. 784; (1921) 21 Columbia Law Rev. 756; (1922) 22 Columbia Law Rev. 45. See (1912) 18 Virginia Law Reg. 300.

of certain feeding stuffs had to pay an annual license fee of $100 in lieu of the normal charge of 10 cents a ton. The complainant had sold some $40,000 worth of its product in the state annually and was held to be in no position to contend that it was injured by the flat $100 fee in lieu of the charge of ten cents a ton. Here again there was no proof that the state had reaped a profit from the law.

Several cases in which state police regulations were held to be invalid regulations of interstate commerce visited the same condemnation on the fees which the state had seen fit to demand. The business of running an international ferry was relieved of a $50 annual license fee in *Sault Ste. Marie* v. *International Transit Co.*[9] Annual license fees of $5 for each express wagon and of 50 cents for each driver were held wrongfully demanded from wagons and drivers engaged in delivering interstate express in *Barrett* v. *New York*[10] and *Platt* v. *New York*.[11] The impositions were said not to be inspection fees or exactions for the use of the streets. The wagons delivered local and interstate freight indiscriminately, but only about two per cent of the business was local. This local business was undoubtedly subject to a proper tax, but the fees before the court were inseparably linked with the invalid provision which sought to prohibit unlicensed vehicles or drivers from engaging in interstate as well as intrastate commerce. The Kansas statute held invalid in *Buck Stove Co.* v. *Vickers*[12] because of its attempt to impose a license and other requirements on foreign corporations engaged exclusively in interstate commerce, required the payment of a $25 filing fee and an annual tax measured by total capital stock. These fiscal requirements did not receive explicit consideration since the invalidity of the police requirements disposed of the controversy, but the provision for the annual tax had been held invalid in an earlier case. Whether the filing fee could be demanded if no more than reasonable compensation for proper supervision is a question not answered, since the case was disposed of on the ground that the method adopted for enforcing the supervision was a direct restraint on interstate commerce.

Fees were sustained in two cases in which the police regulations with which they were connected were held not obnoxious to the commerce clause. *Western Union Telegraph Co.* v. *Richmond*[13] sought to soothe an interstate telegraph company by reminding it that the sum of $2 per pole and $2 per mile of underground wire "is not so great as has been charged and sustained heretofore," and by saying that after it

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[9] (1914) 234 U. S. 333, 34 Sup. Ct. 826; (1921) 21 COLUMBIA LAW REV. 741.
[10] (1914) 232 U. S. 14, 34 Sup. Ct. 203; (1921) 21 COLUMBIA LAW REV. 751. (1922) 22 COLUMBIA LAW REV. 32, n. 10. See (1914) 62 Univ. of Pennsylvania Law Rev. 549. The decision in the court below is treated in (1911) 11 COLUMBIA LAW REV. 476.
[11] (1914) 232 U. S. 35, 34 Sup. Ct. 209; (1921) 21 COLUMBIA LAW REV. 751.
[12] (1912) 226 U. S. 205, 33 Sup. Ct. 41; (1921) 21 COLUMBIA LAW REV. 753.
[13] (1921) 224 U. S. 160, 32 Sup. Ct. 449; (1922) 22 COLUMBIA LAW REV. 46.

"has paid the charges without complaint, for many years, it would require something more than a mere protest now to induce us to find it unreasonable." Such fees do not depend for justification on the taxing power alone, but are also in part a rental charge for the use of the streets and in part a recompense for the cost of supervision which the city may lawfully undertake.

In *De Bary* v. *Louisiana*[14] a license tax on the business of selling intoxicating liquors was held applicable to sales of imports in the original package for the reason that the Wilson Act of Congress permitted the states to deal with such liquor on its arrival. Chief Justice White makes no mention of the fact that the Wilson Act confines its permission to the laws of the state "enacted in the exercise of its police powers," but in reciting the facts he notes that "the court below held, first, that imposing the license was an exertion by the State not only of its revenue powers, but of its police authority, brought into play for the purpose of regulating the sale of liquor."

Three cases apply the established principle that the solicitation of purchasers for goods at the time in other states is a part of an interstate commerce transaction and is therefore a subject that cannot be taxed by a state. *Crenshaw* v. *Arkansas*[15] involved sales of stoves to persons in Arkansas by agents of a Missouri corporation who carried a sample stove around in Arkansas and got orders for similar stoves to be filled from the stock in Missouri. After Arkansas orders were obtained the stoves were shipped from Missouri in carload lots, consigned to the agent of the vendor, and were then delivered to the purchasers in the same form and package in which they had been delivered to the carrier in Missouri. The state court had held that such sales came within the definition of peddling contained in the state statute and had sustained the tax on the authority of an earlier Supreme Court decision permitting a state to tax the peddling of goods of extra-state origin. Mr. Justice Day, after reviewing the cases forbidding the states to tax "drummers" for sales of goods not at the time within the state, held that the sales in the case before him belonged in the same category. The decision relied on by the state court was said to be one in which "there was no movement of goods in interstate commerce because of orders taken for their sale" but in which "the specific articles carried about by the peddler, and none other, were sold and delivered by him." The state was told that it could not by any definition make a peddler out of one who was not a peddler as that term had been used by the Supreme Court in interpreting the commerce clause. Of the case before the court Mr. Justice Day said:

[14] (1913) 227 U. S. 108, 33 Sup. Ct. 239; (1922) 22 COLUMBIA LAW REV. 47. See (1913) 26 Harvard Law Rev. 533, 554.

[15] (1913) 227 U. S. 389, 33 Sup. Ct. 294. See (1913) 1 Georgetown Law Journ. 247; (1913) 18 Virginia Law Reg. 950.

"Here, as the facts show, the sample ranges carried about from place to place are not sold. Orders are taken and transmitted to the manufacturer in another State for ranges to be delivered in fulfillment of such orders, which are in fact shipped in interstate commerce and delivered to the persons who ordered them. Business of this character, as well settled by the decisions of this court, constitutes interstate commerce, and the privilege of doing it cannot be taxed by the state." [16]

Other taxes imposed upon similar transactions by the same Arkansas statute were held invalid in *Rogers* v. *Arkansas*.[17]

The business held not subject to a license tax in *Stewart* v. *Michigan* [18] consisted of sales of groceries and other merchandise from Illinois for which previous orders were obtained in Michigan. The goods were consigned by the shipper in Illinois to himself in Michigan with no identifying marks on the packages except as to their contents. After their arrival an agent of the seller allocated them to the previous purchasers by use of the original orders. In the argument the state conceded that this business was within the principle of the *Crenshaw* case, and sought to sustain the conviction for selling without paying the license tax on the ground that the evidence showed that some sales were made from the car or a storeroom in Michigan without being in response to any previous orders. Chief Justice White insisted, however, that the indictment was for alleged peddling and not for any sales from the car or storeroom, and that to sustain the conviction because of the latter sales, when it was concededly erroneous for those which the state court mistakenly conceived of as peddling, "would amount to a condemnation without a hearing, and therefore constitute a denial of due process of law."

In other cases the complainants were held to be taxable by the state because engaged in other business than interstate commerce. *Singer Sewing Machine Co.* v. *Brickell* [19] involved an Alabama tax on persons selling or delivering sewing machines. In addition to the state tax of $50 annually for each county in which business is done and $25 additional for each wagon in each county, there were county taxes amounting to 50 per cent of the state taxes. In one county in the state the business consisted entirely of the solicitation of orders to be filled from stock without the state. The state court had held this business exempt under the commerce clause, and the Supreme Court remarked that this decision was obviously correct. In the other twenty-nine counties the agents of the complainant took the machines about in wagons, solicited contracts for purchase or rental and made immediate delivery from the wagons to purchasers or lessees. Sales and rentals were also made from stock in established places of business in the state. This

[16] *Crenshaw* v. *Arkansas*, *supra*, footnote 15, p. 401.
[17] (1913) 227 U. S. 401, 33 Sup. Ct. 298.
[18] (1914) 232 U. S. 665, 34 Sup. Ct. 476. See (1914) 12 Michigan Law Rev. 693.
[19] (1914) 233 U. S. 304, 34 Sup. Ct. 493.

business was held to be clearly within an earlier decision allowing the state taxation of peddlers making immediate sales of articles brought into the state before orders are received. The only serious question in the case was whether the statute was separable by counties so that its inapplicability in one county would not interfere with its enforcement in the other twenty-nine. This question the court answered in the affirmative. Whether any part of the tax could have been sustained for any county in which the business was both interstate and intrastate was not considered since the facts did not present it.[20]

The tax sustained in *Banker Brothers Co.* v. *Pennsylvania*[21] was a sales tax of one per cent. The question was whether the sales in question were interstate or intrastate. The Pennsylvania purchasers dealt only with the Banker firm in Pennsylvania who filled their orders by getting cars from the George N. Pierce Company in New York. There was a warranty direct from the extra-state manufacturer to the customer of the Banker firm, and the price to the customer was "f. o. b. factory"; but these circumstances were held not to make the purchaser's transaction one with the extra-state manufacturer as an undisclosed principal. As Mr. Justice Lamar put it:

> "These were mere incidents of the intrastate contract of sale between Banker Brothers Company and the purchaser in Pittsburg, who was not concerned with the question as to how the machine was acquired by his vendor, or whether that company bought it from another dealer in the same city or from the manufacturer in New York. The contract was made in Pennsylvania, and was there to be performed by the delivery of the automobile and the payment of the balance of the purchase price. . . . The court properly held it was not an interstate transaction, but taxable under the laws of Pennsylvania." [22]

In view of later decisions which forbid state taxes on sales within the state of articles of extra-state origin still within the original packages when the vendor owns the goods both before and after their introduction into the state,[23] it is interesting to note that in the *Banker* case nothing is said as to whether the cars were sold in their original packages or not. The opinion states only that "the Banker Brothers Company, on paying the draft, took up the bill of lading, received from the carrier an automobile which, though shipped in interstate commerce, had become at rest in the state of Pennsylvania," and that "Banker Brothers Company had the title, and delivered it to the purchaser on his paying the balance of the purchase money."

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[20] Other cases on state taxation of sales are noted in (1914) 2 California Law Rev. 232 and (1912) 18 Virginia Law Reg. 302.

[21] (1911) 222 U. S. 210, 32 Sup. Ct. 38. See (1912) 74 Central Law Journ. 79; (1912) 25 Harvard Law Rev. 566.

[22] *Banker Brothers Co.* v. *Pennsylvania, supra,* footnote 21, p. 214.

[23] *Askren* v. *Continental Oil Co.* (1920) 252 U. S. 444, 40 Sup. Ct. 355; *Bowman* v. *Continental Oil Co.* (1921) 41 Sup. Ct. 606.

Browning v. *Waycross*[24] involved a municipal ordinance imposing an annual occupation tax of $25 upon "lightning rod agents or dealers engaged in putting up or erecting lightning rods." This was held properly demanded from the agent of an extra-state vendor, because the affixing of the rods after their arrival was thought to be an independent local business not essential to making the interstate sale. The fact that the contract of sale required the seller to erect the rods without extra charge was put aside on the ground that "it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business, protected by the commerce clause." Earlier cases in which acts within the state which separately considered were not interstate commerce but which had been held part of the interstate transaction were distinguished and the possible limitation of the present decision was pointed out by Chief Justice White as follows:

"Of course we are not called upon here to consider how far interstate commerce might be held to continue to apply to an article shipped from one State to another, after delivery and up to and including the time when the article was put together or made operative in the place of destination in a case where because of some intrinsic and peculiar quality or inherent complexity of the article, the making of such agreement was essential to the accomplishment of the interstate transaction. In saying this we are not unmindful of the fact that some suggestion is here made that the putting up of the lightning rods after delivery by the agent of the seller was so vital and so essential as to render it impossible to contract without an agreement to that effect, a suggestion however which we deem it unnecessary to do more than mention in order to refute it."[25]

One of the contentions advanced in *Williams* v. *Talladega*[26] was that a municipal occupation tax of $100 a year on telegraph companies, in spite of being explicitly confined to intrastate business, was a regulation of interstate commerce because the local business was unremunerative. In declining to hold the tax invalid on this ground Mr. Justice Day said:

"It is further contended that the tax is unreasonable and unjust because of its effect upon interstate business. The reasonableness of the ordinance, unless some Federal right set up and claimed is violated, is a matter for the State to determine. It is contended that the result of the tax upon the intrastate business conducted at a loss is to impose a burden upon the other business of the company and is therefore void. The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of eighty-six cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a

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[24] (1914) 233 U. S. 16, 34 Sup. Ct. 578.
[25] *Ibid.* 23.
[26] (1912) 226 U. S. 404, 33 Sup. Ct. 116. See (1913) 18 Virginia Law Reg. 858.

burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right." [27]

It was also held that the tax was not imposed on a federal franchise, since the act of Congress which the complainant adduced as a franchise was held to be purely permissive and to confer no exemption from the ordinary burdens of taxation. In spite of these acquittals the tax was held bad because imposed indiscriminately on all intrastate business including that of sending messages for the federal government. The flat fee made the invalid part of the tax inseparable from the rest.

The objection urged in *Ewing* v. *Leavenworth* [28] against a municipal license tax of $50 a year on express companies transmitting packages between points in the state and not for the federal government was that the traffic in and out of Leavenworth was all interstate because it necessarily passed through Missouri even though it was between Leavenworth and other Kansas points. It had previously been held that a state may tax such proportion of the receipts from transit between two points in the state passing through another state as is properly attributable to the journey within the state. These decisions were held to apply and to render lawful the flat privilege tax of $50 imposed on similar business, without discussion of any possible difference between such a flat tax and one measured only by the proportion of the transit that takes place within the state. A case denying the power of the state to regulate the rates for such interstate-intrastate transportation was held inapplicable because it previously had been pointed out that, while rate regulation directly operates on the transit outside of the borders of the state, taxation does not.

A $100 state privilege tax on commercial reporting agencies was sustained in *United States F. & G. Co.* v. *Kentucky* [29] on the ground that such business is not itself interstate commerce even though the reports of financial credit are sent to extra-state houses contemplating interstate sales to the person whose credit is inquired about. In support of the decision Mr. Justice Pitney said:

"There is no direct or necessary connection between the service performed by plaintiff in error through its representatives and the making or fulfillment of commercial contracts. The most that can be said is that inquiries received by those representatives in Kentucky with respect to the credit and standing of persons engaged in business in that State may be received from merchants without the State in anticipation of commercial transactions between them in the future. . . . The circumstance that in a substantial number of cases—even if in the greater number—there is correspondence, by letter or otherwise, from State to

[27] *Williams* v. *Talladega, supra*, footnote 26, pp. 416-17.

[28] (1913) 226 U. S. 464, 33 Sup. Ct. 157. See (1913) 13 Columbia Law Rev. 551; (1913) 26 Harvard Law Rev. 457.

[29] (1913) 231 U. S. 394, 34 Sup. Ct. 122. See (1914) 14 Columbia Law Rev. 147, 173. The decision in the state court is commented on in (1911) 20 Yale Law Journ. 315.

State, which may perhaps have an effect upon the conduct of other parties about entering or not entering into transactions of interstate commerce, is not controlling.

"The present case has no close parallel in former decisions, but in some of its aspects it bears a resemblance to the case of a tax imposed upon a resident citizen engaged in a general business that happens to include a considerable share of interstate business; *Ficklen* v. *Shelby County,* 145 U. S. 1. Or the business of the live stock exchange that was under consideration in *Hopkins* v. *United States,* 171 U. S. 578, 592. Or the business of a cotton broker dealing in futures or options. *Ware* v. *Mobile County,* 209 U. S. 405.

"To warrant interference with the exercise of the taxing power of a State on the ground that it obstructs or hampers interstate commerce, it must appear that the burden is direct and substantial. We do not think the present is such a case." [30]

It may be noted that Mr. Justice Pitney hints that this commercial reporting business is not commerce at all and that this rather than the want of an interstate character in the business, may be his dominant thought.

This idea is more explicitly the basis of *New York Life Insurance Co.* v. *Deer Lodge County* [31] which held a foreign insurance company liable to a tax measured by the excess of premiums over losses and ordinary expenses, although the policies came from without the state and the premiums were transmitted from the taxing state to the home office in another state. Mr. Justice McKenna reviews the earlier cases establishing the doctrine "that insurance was not commerce, but a personal contract" and adds his approval of that doctrine as follows:

"A policy of insurance, the cases declare, is a personal contract, a mere indemnity, for a consideration, against the happening of some contingent event which may bring detriment to life or property, and its character is the same no matter what the event insured against; . . . Nor does the character of the contracts change by their numbers or the residence of the parties. . . .

"The number of transactions do not give the business any other character than magnitude. . . . Nor, again, does the use of the mails determine anything. Certainly not that which takes place before and after the transaction between the plaintiff and its agents in secret or in regulation of their relations. But put agents to one side and suppose the insurance company and the applicant negotiating or consummating a contract. That they may live in different States and hence use the mails for their communications does not give character to what they do; cannot make a personal contract the transportation of commodities from one State to another, to paraphrase *Paul* v. *Virginia.* Such might be incidents of a sale of real estate (certainly nothing can be more immobile). Its transfer may be negotiated through the mails and completed by the transmission of the consideration and the instrument of transfer also through the mails.

"It is contended that the policies are subject to sale and transfer,

[30] *United States F. & G. Co.* v. *Kentucky, supra,* footnote 29, pp. 398-99.

[31] (1913) 231 U. S. 495, 34 Sup. Ct. 167. See (1914) 14 COLUMBIA LAW REV. 149, 173; (1914) 8 Illinois Law Rev. 641; (1914) 12 Michigan Law Rev. 498.

may be used for collateral security and other commercial purposes. This may be, but this use of them is after their creation, a use by the insured, not by the insurer. The quality that is thus ascribed to them may be ascribed to any instrument evidencing a valuable right. The argument was anticipated in *Paul* v. *Virginia*, citing *Nathan* v. *Louisiana*, where, as we have seen, a tax on money and exchange brokers, who dealt in the purchase and sale of foreign bills of exchange was sustained as not conflicting with the constitutional power of Congress to regulate commerce among the States or with foreign nations." [32]

The insurance company relied on cases holding that the transportation of lottery tickets across state lines and the enterprise of education by correspondence across state lines are interstate commerce, but Mr. Justice McKenna answered that these "were concerned with transactions which involved the transportation of property, and were not mere personal contracts." Among "cognate cases . . . of contracts incident to commerce, but not of themselves commerce," he referred to those sustaining state taxes on the solicitation of laborers to work in other states, on contracts for the sale of cotton for future delivery which might be fulfilled by furnishing cotton from any source, and on the business of receiving money for transmission. Justices Hughes and Van Devanter dissented, but without stating their reasons.

Of five cases dealing with taxes on foreign corporations, three involved excises measured by part or all of the gross receipts from business done within the state. It is well established that gross receipts from interstate commerce are not, as such, a proper subject of state taxation; but indirect ways of taxing them are sometimes excused. Thus in *United States Express Co.* v. *Minnesota* [33] where the imposition measured by gross receipts was declared by the statute to be in lieu of all taxes on property, the demand was sustained as a property tax. Some of the receipts included in the assessment were for the Minnesota part of the carriage between two Minnesota points over a line partly in another state. This was held proper under previous decisions holding that such a tax is not a burden on interstate commerce. Other receipts were from the carriage in Minnesota of express passing through the state or entering or leaving it. As to these Mr. Justice Day declared:

"The right of the state to tax property, although it is used in interstate commerce, is thoroughly well settled. . . .

"The Supreme Court of Minnesota construed the tax to be a property tax, measured by the gross earnings within the State, which, under their construction of the tax, included the earnings here in question. . . . While the determination that the tax is a property tax measured by gross receipts is not binding upon this court, we are not

[32] *New York Life Ins. Co.* v. *Deer Lodge County, supra*, footnote 31, pp. 508-10.

[33] (1912) 223 U. S. 335, 32 Sup. Ct. 211. See (1912) 25 Harvard Law Rev 671; (1912) 10 Michigan Law Rev. 653. The decision in the state court is treated in (1911) 25 Harvard Law Rev. 95.

prepared to say that this conclusion is not well founded, in view of the provisions and purposes of the law.

"The statute itself provides that the assessments under it 'shall be in lieu of all taxes upon its property.' In other words, this is the only mode prescribed in Minnesota for exercising the recognized authority of the State to tax the property of express companies as going concerns within its jurisdiction. If not taxed by this method, the property is not taxed at all. . . .

"Upon the whole, we think the statute falls within that class where there has been an exercise in good faith of a legitimate taxing power, the measure of which taxation is in part the proceeds of interstate commerce, which could not, in itself, be taxed, and does not fall within that class of statutes uniformly condemned in this court, which show a manifest attempt to burden the conduct of interstate commerce, such power, of course, being beyond the authority of the State." [34]

It was also pointed out that there was no suggestion in the record "that the amount of the tax is unduly great, having reference to the real value of the property of the company within the state and the assessment made."

The gross receipts tax before the court in *Meyer* v. *Wells, Fargo & Co.*[35] was declared by the Oklahoma statute under which it was levied to be "in addition to the taxes levied and collected upon an ad valorem basis upon the property and assets of such corporation." There was dispute as to the proper construction of these words, but the court found that all the property and assets were subject to the separate ad valorem tax and held that this gross receipts tax "cannot be an attempt to reach the value of what is by the law to be valued and taxed in a different way." Mr. Justice Holmes insisted further that the gross receipts tax was not "intended to reach only the additional value given by its being part of a going concern to property already taxed in the separate items" and that "it is plain that the gross receipts from all sources could not have been used as a means for estimating the going value of the property within the state." In this view of the tax, it was clearly condemned by prior decisions. The court refused to reinterpret the statute so as to confine its grasp to receipts from intrastate commerce, since it plainly sought to reach "the total gross receipts." Even as a property tax, the assessment would be bad because a good part of the gross receipts came from investments in bonds and land all outside of Oklahoma. Further points in the case involved the propriety of issuing an injunction and the absence of any necessity of a tender by the complainant of what it might lawfully be compelled to pay.

The gross receipts tax sustained in *Ohio Tax Cases*[36] explicitly

[34] *United States Express Co.* v. *Minnesota, supra,* footnote 33, pp. 344-48.

[35] (1912) 223 U. S. 298, 32 Sup. Ct. 218. See (1912) 25 Harvard Law Rev. 671. In (1910) 9 Michigan Law Rev. 702 is a note on *Galveston, H. & S. A. Ry. Co.* v. *Texas* (1908) 210 U. S. 217, 28 Sup. Ct. 638, holding that a state cannot tax gross receipts from interstate commerce.

[36] (1914) 232 U. S. 576, 34 Sup. Ct. 372. Mr. Justice Day did not sit.

excluded "all earnings derived wholly from interstate business or business done for the federal government." Yet the company contended that the tax was in effect on interstate commerce because it was a substitute for a prior tax on all receipts which had been assessed at a rate of one per cent, the present tax being assessed at a rate of four per cent on the intrastate receipts which were in fact about one-fourth of the total receipts. Thus the new tax on the local receipts at the higher rate yielded about what would come in from the old tax on total receipts at the lower rate. Mr. Justice Pitney disposed of this objection by saying:

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. We could not do this without in effect denouncing the legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution. Assuming the law was changed in 1910 because of a fear that the Cole Law would be held unconstitutional, the mere fact that, while excluding interstate earnings from the multiplicand, the multiplier was increased, is not of itself deemed sufficient evidence of an unlawful effort to burden a privilege that is not a proper subject of state taxation." [37]

Two cases related to corporate excises measured by total capital stock or having some reference thereto. It had previously been held that an excise on the local business of an interstate telegraph company measured by its total capital stock is in substance a tax on property without as well as within the state and is therefore invalid as a regulation of interstate commerce and a denial of due process of law. Such a tax on a foreign railroad corporation came before the court in *Atchison; T. & S. F. Ry. Co.* v. *O'Connor* [38] and was held to be within the ruling of the earlier cases. After noting that the Colorado statute imposed a tax of 2 cents on each $1000 of the plaintiff's capital stock, Mr. Justice Holmes continued:

"The plaintiff is a Kansas corporation. The greater part of its property and business is outside of the state of Colorado, and of the business done within that State but a small proportion is local, the greater part being commerce among the States. Therefore it is obvious that the tax is of the kind decided by this court to be unconstitutional, . . . even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to business wholly within the State. . . . The defendant did not argue that the tax could be maintained, but contended only that the payment was voluntary and that the defendant is not the proper person to be sued." [39]

[37] *Ohio Tax Cases, supra,* footnote 36, p. 593.
[38] (1912) 223 U. S. 280, 32 Sup. Ct. 216.
[39] *Ibid.* 285.

The payment was held not to be voluntary, since the statute forfeited the right of the corporation to do business until the tax was paid, and imposed a penalty of ten per cent for each delay of six months or fraction thereof. The defendant secretary of state was held subject to suit because he had taken the money after protest and because provision was made in the statute for refunding by the state auditor when it was determined in any action at law that a corporation had erroneously paid a tax to the secretary of state. "We must presume," concluded Mr. Justice Holmes, "that a judgment in the present action would satisfy the law." [40]

A variant of the excises measured by total capital stock came before the court in *Baltic Mining Co.* v. *Massachusetts* [41] and was sustained by a vote of six to three, Chief Justice White and Justices Van Devanter and Pitney composing the minority. To the general provision in the statute imposing an annual excise of one-fiftieth of one per cent of the par value of the authorized capital stock was added a proviso that "the amount of such excise tax shall not in any one year exceed the sum of $2,000." Neither of the two corporations before the court came within the shelter of this maximum limit, and the tax on each was in fact measured by its total capital stock. The Baltic Mining Company had $2,500,000 authorized capital and its tax was $500. Its assets were over $10,000,000, all of which were outside of Massachusetts with the exception of current bank deposits and a certificate for $80,000 of stock in another Michigan corporation. Its business was producing copper in Michigan and selling it throughout the country. Its local business in Massachusetts consisted of its general financial transactions. The S. S. White Dental Mfg. Co. had an authorized capital of $1,000,000 and its tax was $200. Its assets were over $5,000,000 of which only about $100,000 were in Massachusetts. It made local sales of dental supplies in Massachusetts. The state court had construed the statute not to apply "to corporations whose business is interstate commerce, or who carry on interstate and intrastate business

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[40] In *Gaar, Scott & Co.* v. *Shannon* (1912) 223 U. S. 468, 32 Sup. Ct. 236, a foreign corporation engaged solely in interstate commerce failed to recover back a state franchise tax which it had paid on demand, since the Supreme Court held that the state court's decision that the payment was voluntary was worthy of acceptation and that therefore the case had been rightly decided below on a non-federal ground. Previous state decisions had settled that the franchise tax act had no application to corporations doing an interstate business. Had the payment been under duress, it could of course been recovered, but Mr. Justice Lamar laid down that "neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment is treated as duress." There were provisions in the statute which would have operated as duress had they been applicable to the complainant, but the previous holding of the state court that they were not applicable made its indulgence in the payment voluntary. For a note on the question of the remedy in this case and in *Atchison, T. & S. F. R. Co.* v. *O'Connor, supra,* footnote 38, see (1912) 25 Harvard Law Rev. 668.

[41] (1913) 231 U. S. 68, 34 Sup. Ct. 15. See (1914) 2 California Law Rev. 321; (1914) 14 COLUMBIA LAW REV. 434, 455; (1914) 27 Harvard Law Rev. 275, 289; (1914) 12 Michigan Law Rev. 210; (1913) 19 Virginia Law Reg. 629; (1914) 1 Virginia Law Rev. 477, 489; and (1914) 23 Yale Law Journ. 451.

in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business." This must mean that the mere fact of conducting interstate commerce does not relieve the corporation from the tax if it also conducts a substantially separate and independent intrastate business. In so far as Mr. Justice Day distinguished previous cases on the ground that they involved interstate transportation and closely integrated interstate and intrastate business while the complainants before him were manufacturing and sales corporations, the distinction no longer is revered, for later cases [42] have held that excises measured by total capital stock with no maximum limit are invalid when applied to such corporations as those in the principal case. The continuing authority of the case depends, therefore, upon the fact that the maximum limit of $2,000—which would serve only corporations having an authorized capital in excess of $10,000,000—somehow distinguishes the tax from a capital stock tax even when it is in fact measured by the capital stock. Mr. Justice Day tells us that "each case involving the validity of a tax must be decided on its own facts," and that earlier cases "have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce, or to tax property beyond the jurisdiction of the state." The principles upon which he relies to support the tax before him are put as follows:

"The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. . . . It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the State, has been sustained." [43]

In applying these principles to the cases at bar, the opinion first states its agreement with the state court that the tax is an excise and not a tax upon property, and adds:

"In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporations, including that used in such commerce, represented by the authorized capital of the corporations, is taxed, and therefore interstate commerce is unlawfully burdened by a state statute. While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. . . . Further, the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without

[42] *Looney* v. *Crane Co.* (1917) 245 U. S. 178, 38 Sup. Ct. 85; *International Paper Co.* v. *Massachusetts* (1918) 246 U. S. 135, 38 Sup. Ct. 292; *Locomobile Co.* v. *Massachusetts* (1918) 246 U. S. 146, 38 Sup. Ct. 298.

[43] *Baltic Mining Co.* v. *Massachusetts, supra,* footnote 41, pp. 82-83.

the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable." [44]

In two cases a claim to exemption under the commerce clause from taxes on property alleged to be in the course of interstate transit was denied on the ground that the transit had been interrupted for an independent object. *Bacon* v. *Illinois* [45] involved grain shipped from the South and West through Chicago to the Atlantic Coast under contracts which reserved to the owners the right to remove it from the cars at Chicago for the temporary purpose of weighing, cleaning, grading, etc. Bacon, a Chicago resident, bought the grain while in transit, and removed it to his elevator in Chicago for cleaning, grading and weighing. It was not his intention to dispose of it in Illinois but it was within his power to do so. After saying that the commerce clause protects grain in interstate transit from taxation at the domicil of its owner as well as elsewhere, Mr. Justice Hughes disposes of the claim to exemption as follows:

"But neither the fact that the grain had come from outside the State nor the intention of the owner to send it to another State and there to dispose of it can be deemed controlling when the taxing power of the State of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the State in an assessment for taxation which was made in the usual way without discrimination. . . .

"The question, it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority. . . . Thus, goods within the State may be made the subject of a non-discriminatory tax though brought from another State and held by the consignee for sale in the original packages. . . .

"In the present case the property was held within the State for purposes deemed by the owner to be beneficial; it was not in actual trans-

[44] *Ibid.* 86-87. Discussion of state taxing power over foreign corporations appears in Harold M. Bowman, *The State's Power Over Foreign Corporations* (1911) 9 Michigan Law Rev. 549; William C. Coleman, *Constitutional Limitations Upon State Taxation of Foreign Corporations* (1911) 11 COLUMBIA LAW REV. 393; and notes in (1914) 14 COLUMBIA LAW REV. 687; (1911) 59 Univ. of Pennsylvania Law REV. 256.

Another limitation on state taxing power is dealt with in Edward E. Curtis, *State Tonnage Laws and the Constitution* (1914) 48 American Law Rev. 199.

[45] (1913) 227 U. S. 504, 33 Sup. Ct. 299. See (1913) 26 Harvard Law Rev. 658.

portation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the State his share of the expenses of local government." [46]

Susquehanna Coal Co. v. *South Amboy* [47] sustained a New Jersey property tax on coal from Pennsylvania which was piled in New Jersey to fill anticipated orders in New York. This storage was declared by Mr. Justice McKenna to be "something more than the submission to delay in transportation and the acceptance of its consequences." The accumulation in New Jersey was necessary in order to be able satisfactorily to supply the New York market and thus "the situation was made a facility of the business." This brought the case within earlier decisions holding that goods are taxable where they are when their interstate transit has been broken for a purpose not incidental to the transit.

The property tax unsuccessfully objected to as a regulation of interstate commerce in *Darnell* v. *Indiana* [48] was one on the shares of foreign corporations held by domestic owners. The commerce complaint was one of discrimination against interstate commerce because the shares of foreign corporations were taxed to domestic owners even when property of such corporations located within the state was also taxed, while shares in domestic corporations were assessed only to the extent that they represent value in excess of the taxable property of the corporation. This complaint was given no consideration by the court for the reason that the one who made it had failed to show that the facts in his case brought him within the constitutional principle which he adduced. The case contains no intimation that any greater comfort would have been extended to those who established that they suffered from such a discrimination.

A glance backward at the cases here reviewed will show that the great majority of the taxes dealt with were special excises of one kind and another. Only three cases had to do with applications of the general property tax, and in all of these the tax was sustained. Three cases involved taxes measured by gross receipts. One of these taxes was a substitute for a property tax and was treated by the court as a property tax and was therefore held valid as such. This decision alone is enough to establish that the states may tax interstate commerce if they go about it in the right way. This has long been evident from cases in which property whose value is due to its employment in interstate commerce is allowed to be assessed by capitalizing its earnings. It has become even clearer in recent years with the sanction bestowed on state taxes on total net income including that from interstate or foreign commerce. States find the commerce clause no impediment to their customary general modes

[46] *Bacon* v. *Illinois*, *supra*, footnote 45, pp. 515-17.

[47] (1913) 228 U. S. 665, 33 Sup. Ct. 712. A similar state case is discussed in (1913) 26 Harvard Law Rev. 358, 375.

[48] (1912) 226 U. S. 390, 33 Sup. Ct. 120.

of raising revenue. They find it an obstacle only to special and peculiar exactions on selected enterprises. From such exactions the enterprise of interstate commerce is exempt. The reason given by the court is that the interstate commerce that consists of transportation or the interchange of goods is a kind that demands uniformity of regulation throughout the country and a kind, therefore, over which the regulatory power of Congress is exclusive. This doctrine is an adequate foundation for all the cases in which state taxes are held void. Trouble begins only when we come to the cases sanctioning taxes that may take from interstate commerce a heavier toll than do the demands that the commerce clause is held to inhibit. How shall we escape from the apparent inconsistency?

The way out is believed to be this. Interstate commerce is an enterprise within a state and subject to its territorial jurisdiction like any other enterprise. If it were to be exempted from state taxation, it would in effect receive a bounty which competing local enterprise is necessarily denied because of the fiscal necessities of the state. There is no reason why interstate commerce should not pay its way like all other commerce. Where the state gives adequate guarantees that interstate commerce is subjected to no other burdens than those imposed on local commerce generally, its tax on interstate commerce is sustained. Such guarantees are found in the general property tax and in general taxes on net income. These, in fact, regulate interstate commerce, but regulate it only as they regulate all other business. When, however, the state imposes special exactions on selected enterprises, there is no guaranty that it will treat interstate and local commerce alike. It may pick and choose and may in the main put heavier burdens on interstate commerce than on domestic business generally. Thus any special excise opens the possibility of a discrimination against the subject matter on which it is imposed. The underlying practical justification for the decisions forbidding the states to put special excises on interstate commerce is the extreme likelihood of resulting discrimination against interstate commerce. The practical justification for the decisions allowing the state to impose general property or net income taxes on interstate commerce is that such commerce should share with other commerce the burden of supporting the state services which it enjoys and on which its security and prosperity depend. This analysis, it is believed, will stand the test of the cases. If it does not fit authoritative doctrine, the doctrine should be changed to fit the facts. The facts seem to be that the states may tax interstate commerce if they guard adequately against discriminating against that commerce, but that they may not tax interstate commerce in ways that have the potentiality of such discrimination.

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